

***United States Court of Appeals
for the Second Circuit***

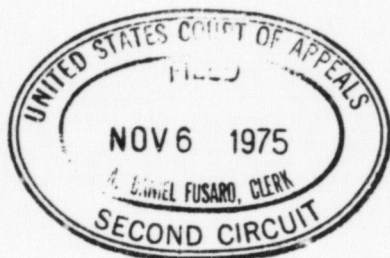


APPENDIX

75-7534

United States Court of Appeals

For the Second Circuit.



LORRAINE BERMAN,
Plaintiff-Appellant,
against

CARL A. VERGARI, District Attorney of
Westchester County,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

SHATZKIN, COOPER, LABATON, RUDOFF &
BANDLER,
Attorneys for Plaintiff-Appellant,
235 East 42nd Street,
New York, N. Y. 10017
(212) 687-8800.

CARL A. VERGARI,
District Attorney, Westchester County,
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UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

- - - - -X

LORRAINE BERMAN,

Plaintiff-Appellant,

-against-

CARL A. VERGARI, District Attorney of Westchester County,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

- - - - -X

DOCKET ENTRIES.

Date		Proceedings.
Jul 21, 75	1	Filed Complaint and issued summons.
Jul 23, 75	2	Filed Pltffs. affidavit & notice of motion for an order of preliminarily enjoining. Ret. 8-12-75.
Jul 23, 75	3	Filed Pltffs. Memorandum of Law.
Jul 24, 75	4	Filed Order appointing an individual to serve process. Clerk.
7-24-75	5	Filed Summons and proof of service by Terry Cooper on 7-21-75.

DOCKET ENTRIES

Date		Proceedings
8-12-75	6	Filed Pltffs. Memorandum of Law.
8-09-75	7	Filed Defts. affidavit & notice of motion for an order dismissing the complaint. Ret. 8-12-75.
8-09-75	8	Filed Defts. Memorandum of Law.
8-18-75	-	Filed Memo. End. on document #7. Accord- ingly, defts. motion is granted & the complaint is dismissed. Ward J. (mailed notice)
8-18-75	-	Filed Memo. End. on document #2. Motion denied in accordance with memorandum en- dorsed on defts. motion to dismiss. Ward J. (mailed notice)
9-10-75	9	Filed Pltffs. Notice of Appeal from the order dtd. 8-18-75. (mailed notice)

COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

LORRAINE BERMAN,

Plaintiff,

-against-

CARL A. VERGARI, District
Attorney of Westchester County,

Defendant.

Judge Ward

75 CIV 3558

COMPLAINT

-----x

I. INTRODUCTION

1. On August 15, 1974, by Indictment No. 74-00652, plaintiff was indicted in Westchester County of the State of New York on two counts, the felony of grand larceny in the second degree (Penal Law §155.35) and the misdemeanor of violating §366-b of the Social Services Law.

2. The grand jury which indicted her (Grand Jury "A") contained no women.

3. This action is brought to declare that the prosecution of the plaintiff is improper because the statute (New York State Judiciary Law §665(7)) which provided for the impanelling of the grand jury was unconstitutional, and to restrain the defendant, the District Attorney of Westchester County, from the

COMPLAINT

prosecution of the plaintiff under said indictment.

4. On January 21, 1975, the United States Supreme Court in Taylor v. Louisiana, ___ U.S. ___, 42 L Ed 2d 690, 95 S. Ct. ___, held unconstitutional a statute which excluded or provided for the automatic exemption of women from service on juries, either petit or grand. On January 27, 1975, in Daniel v. Louisiana, ___ U.S. ___, 42 L Ed 2d 790, 95 S. Ct. ___, the Supreme Court held that its holding in Taylor was not to be applied retroactively to cases in which there had been a conviction. Plaintiff has not been convicted and has unsuccessfully sought dismissal of the indictment in the County Court of Westchester County. Subsequent to the Supreme Court decisions in Taylor and Daniel, and following a message by the Governor to the legislature, in which he referred to the unconstitutionality of §665(7) of the Judiciary Law, that section was repealed.

II. JURISDICTION

5. Jurisdiction is conferred upon this Court by the provisions of 28 U.S.C. §1343(3)(4), which provide for original jurisdiction of this Court in suits arising under color of state law to redress the rights, privileges and immunities secured by the United States Constitution. Plaintiff's request

COMPLAINT

for injunctive relief is authorized by 42 U.S.C. §1983. Plaintiff's request for declaratory relief is sought pursuant to 28 U.S.C. §2201 and §2202.

III. THE PARTIES

7. Plaintiff is an adult citizen of the United States and of the State of New York. She resides at 27 Cedar Drive East, Briarcliff Manor, County of Westchester, New York. The defendant, CARL A. VERGARI, is the District Attorney of Westchester County.

IV. EVENTS LEADING TO INDICTMENT

8. The defendant, CARL A. VERGARI, commenced an investigation which led to the plaintiff's indictment.

9. The grand jury to which the matter was submitted, Grand Jury "A", was one of two impanelled in August of 1974. There were no women on the Grand Jury "A". There were 22 men and one woman on the Grand Jury "B".

10. Plaintiff was thereafter indicted in a two-count indictment referred to above.

11. By order dated May 20, 1975, the Westchester County Court denied plaintiff's motion to dismiss the indictment. On that motion, plaintiff asserted that the statute governing the impanelling of the grand jury was repugnant to both the Sixth and

COMPLAINT

Fourteenth Amendments to the United States Constitution and the cases decided thereunder; that thousands of New York women had claimed the exemption prior to Taylor (affirmation of Douglas A. Cooper annexed hereto as Exhibit "A"); that the grand jury was therefore unconstitutionally impanelled; and that the continued prosecution of the plaintiff was unconstitutional. A copy of the decision is annexed hereto as Exhibit "B".

V. PLAINTIFF'S CLAIM

12. On August 16, 1974, the date on which plaintiff was indicted, §665(7) of the New York State Judiciary Law allowed women in the State of New York an automatic exemption from jury duty.

13. On plaintiff's motion to dismiss the indictment based upon the unconstitutionality of §665(7), plaintiff urged upon the Westchester County Court that since plaintiff has not yet been tried, the United States Supreme Court decision in Taylor mandated a dismissal of the indictment, and that Daniel was no bar to the application of Taylor in those cases in which there had not yet been a conviction.

14. County Court Judge Lawrence N. Martin, Jr., in denying plaintiff's motion, held, inter alia,

COMPLAINT

(a) that exclusion was constitutionally distinguishable from exemption and that Taylor held only that automatic exclusion of women from jury rolls was unconstitutional; therefore, since New York allowed only an automatic exemption, the New York system was without the scope of Taylor;

(b) that Daniel held that Taylor was not to be applied retroactively; and

(c) that there is no guaranteed right under the United States Constitution to be prosecuted pursuant to an indictment returned by a grand jury.

15. Judge Martin's distinction between exemption and exclusion was made despite the language of Taylor, which states that

...it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male.

[Emphasis added.] 42 L Ed 2d at 702, and his conclusory statement as to retroactivity was made despite the plain holding of Daniel that

Taylor is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empanelled

COMPLAINT

prior to the date of that decision.

[Emphasis added.] 42 L Ed 2d at 792.

16. The New York Criminal Procedure Law (§450.10) does not allow a pre-conviction appeal. Daniel prohibits the application of Taylor if there has been a conviction. Thus, by operation of the Criminal Procedure Law, plaintiff will be barred from challenging the constitutionality of her indictment if she is convicted.

17. A statute similar to the one under which the grand jury which indicted the plaintiff was impanelled has been held unconstitutional by the United States Supreme Court. The New York statute was repealed in recognition of its unconstitutionality, and at this pre-conviction stage, a challenge to the validity of a prosecution commenced pursuant to an unconstitutionally obtained indictment is not beyond plaintiff's reach.

18. The continued prosecution of the plaintiff pursuant to an indictment unconstitutionally obtained constitutes bad faith and harassment, and will cause plaintiff irreparable harm.

19. The Supremacy Clause of Article VI of the United States Constitution requires the intervention of this Court to prevent the violation of the Constitution and to prevent great

COMPLAINT

and immediate irreparable injury to plaintiff.

20. No previous application for the relief sought herein has been made.

WHEREFORE, plaintiff respectfully prays that this Court:

(a) Assume jurisdiction of this cause, pursuant to 28 U.S.C. §1343(3)(4);

(b) Grant a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant, his agents, employees, successors and all others acting in concert with him, from prosecuting plaintiff under Indictment No. 74-00652 during the pendency of this action;

(c) Enter a final judgment pursuant to 28 U.S.C. §§2201, 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that §665(7) of the New York Judiciary Law, as it stood at the time the plaintiff was indicted, was contrary to the Sixth and Fourteenth Amendments to the United States Constitution, and that the continued prosecution of plaintiff violates plaintiff's rights thereunder;

(d) Grant a permanent injunction pursuant to 42 U.S.C. §1983, enjoining defendant, his agents, employees, successors and all others acting in concert with him, from prosecuting plaintiff under Indictment No. 74-00652; and

10a

COMPLAINT

(e) Grant plaintiff such other and further relief
as the Court may deem just and proper.

SHATZKIN, COOPER, LABATON, RUDOFF
& BANDLER

BY: 

A Member of the Firm
Attorneys for Plaintiff
Office and P.O. Address
235 East 42nd Street
New York, New York 10017
(212) 687-8800

EXHIBIT A, ANNEXED TO COMPLAINT--AFFIRMATION OF
DOUGLAS A. COOPER.

COUNTY COURT : COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-Against-

LORRAINE BERMAN,

Defendant.

AFFIRMATION

Indictment No.
74-00652

-----X
DOUGLAS A. COOPER, an attorney duly admitted to practice
in the Courts of the State of New York, affirms under the penai-
ties of perjury and says:

1. That he is an associate in the firm of SHATZKIN,
COOPER, LABATON, RUDOFF & BANDLER, attorneys for the defendant
herein.
2. That on April 1, 1975, he met with Richard N. Lander,
Commissioner of Jurors for the County of Westchester. At that
meeting, Commissioner Lander was asked to discuss the jury selec-
tion process in Westchester County which existed during the year
1974, and more particularly August of that year, the month in
which the defendant herein was indicted.
3. Commissioner Lander made the following approximations:
 - a) The ratio of men to women on the return date of
jury summonses was approximately 70% to 30%.
 - b) In January of 1974, the percentage of women on

EXHIBIT A, ANNEXED TO COMPLAINT

the jury panel was 21.8%.

- c) In April of 1974, the percentage of women on the jury panel was 27.7%.
- d) In June of 1974, the percentage of women on the jury panel was 26.1%.
- e) In September of 1974, the percentage of women on the jury panel was 26.6%.
- f) Whatever the percentage of women on the jury panel, it is always lower on the Grand Jury.
- g) During the years preceding the Supreme Court decision in Taylor v. Louisiana (____ U.S.____, dec. January 21, 1975), thousands of women claimed the exemption provided in §665(7) of the Judiciary Law.

4. Commissioner Lander stated as fact the following:

- a) Lorraine Berman was indicted by Grand Jury "A" in August of 1974.
- b) There were no women on the August Grand Jury "A".
- c) August Grand Jury "B", which sat at the same time as the Grand Jury which indicted the defendant herein, was comprised of 22 men and only one woman.
- d) In both of the August Grand Jury panels, there

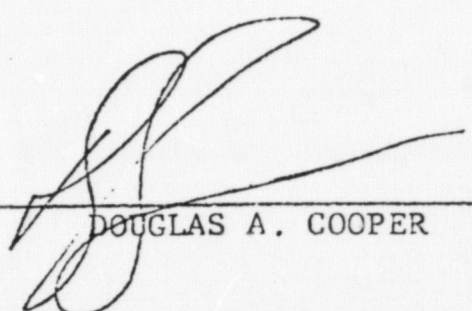
EXHIBIT A, ANNEXED TO COMPLAINT
was only one woman.

5. As will be more fully discussed in the accompanying memorandum of law, the Grand Jury which indicted the defendant was, based on the above facts, unconstitutionally impaneled.

6. Accordingly, the indictment against the defendant should be dismissed.

WHEREFORE, affirmant respectfully requests that the Court dismiss both counts of the indictment against the defendant herein.

DATED: April 9, 1975.



DOUGLAS A. COOPER

EXHIBIT B, ANNEXED TO COMPLAINT--DECISION BY MARTIN, J.
COUNTY COURT : WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment No.
74-652

LORRAINE BERMAN,

Defendant.

MARTIN, J.

The defendant who has been indicted for the crimes of Grand Larceny in the Second Degree and Violation of §366-b of the Social Services Law moves to dismiss the indictment, asserting that she has been deprived of her constitutional rights since at the time of the indictment women were permitted to exempt themselves from jury duty under §665(7) of the Judiciary Law. In a separate motion, the defendant moves to dismiss the second count in the indictment on the ground that §366-b of the Social Services Law was improperly invoked.

The constitutional argument is in large measure predicated upon the case of Taylor v. Louisiana (42 L. Ed. 2d 690) in which the United States Supreme Court held that the automatic exclusion of women from jury rolls was unconstitutional. However, in New York there was no automatic exclusion of women as a class, but rather a provision for exemption in those situations where one was claimed. In other words, under the New York law as it then

EXHIBIT B, ANNEXED TO COMPLAINT

existed women were required to take affirmative action in order to avoid jury duty. Furthermore, the indictment in this case was handed down several months prior to the court's decision in Taylor v. Louisiana (supra) and it is clear that such holding is not to be applied retroactively (Daniel v. Louisiana, 42 L. Ed. 2d 790). It should also be noted that the Supreme Court cases hereinabove referred to involved petit juries and not grand juries and there is no guaranteed right under the United States Constitution to be prosecuted pursuant to an indictment returned by a grand jury. The court has had occasion to consider these questions in numerous cases in the past and has consistently held that the indictment was not invalid or void on constitutional grounds. The defendant's counsel has prepared an exceptionally thorough and competent brief in support of his client's position. Nevertheless, the court is not persuaded that the defendant has been deprived of any rights guaranteed to her under the Constitution. Accordingly, this motion is denied.

The argument that §366-b of the Social Services Law has been improperly invoked against the defendant is based upon the holding in United States v. Ehrlichman (297 F. Supp. 219). That case did not involve the Social Services Law, but instead involved a conviction under a federal statute for making false representations to an agent of the Federal Bureau of Investigation. There the court concluded that the statute under which defendant was convicted was not intended "to be applied to statements given to the F.B.I. voluntarily

EXHIBIT B, ANNEXED TO COMPLAINT

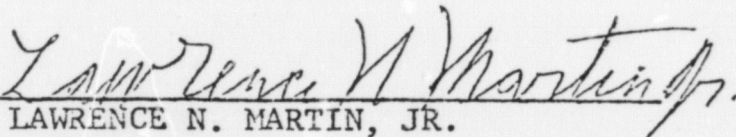
or without oath . . .". In the present case, the defendant is charged with having violated the Social Services Law by having deliberately concealed a material fact, to wit: the existence of property and resources of Edith M. Levy. The question as to whether the statute has been violated as charged in the indictment is a question of fact for determination at trial, and not a question of law for determination by the court at this stage of the proceedings. Accordingly, the motion is denied.

The aforesaid constitutes the decision and order on the motions.

The County Clerk is directed to serve a copy of this decision and order, with notice of entry, upon the defendant's counsel, and the District Attorney.

Dated: May 20, 1975

White Plains, New York



LAWRENCE N. MARTIN, JR.
County Court Judge

HON. CARL A. VERGARI
District Attorney
Courthouse
White Plains, New York 10601

SHATZKIN, COOPER, LABATON, RUDOFF, ESQS.
Attorneys for Defendant
235 East 42nd Street
New York, New York 10017

PLAINTIFF'S NOTICE OF MOTION TO ENJOIN DEFENDANT
FROM PROSECUTING PLAINTIFF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

LORRAINE BERMAN,

Plaintiff,

Judge Ward

-against-

75 CIV 3558 R J W

CARL A. VERGARI, District
Attorney of Westchester County,

NOTICE OF MOTION

Defendant.

-----x

SIR:

PLEASE TAKE NOTICE, that upon the affidavit of BURTON
S. COOPER, sworn to the 16th day of July, 1975, the complaint and
supporting memorandum of law, the undersigned will move this
Court on August 12, 1975, at 2:15 in the afternoon of that day,
at the United States Courthouse, Foley Square, New York, New York,
for an order pursuant to Rule 65 of the Federal Rules of Civil
Procedure, preliminarily enjoining the defendant from prosecuting
the plaintiff under Westchester County Indictment No. 74-00652,
and for such other and further relief as may be just and proper.

DATED: New York, New York
July 16, 1975

Yours, etc.

SHATZKIN, COOPER, LARATON, RUOFF
& BANDLER

TO: CARL A. VERGARI
District Attorney of
Westchester County
111 Grove Street
White Plains, New York 10601

AFFIDAVIT OF BURTON S. COOPER IN SUPPORT OF PLAINTIFF'S MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

LORRAINE BERMAN,

Plaintiff,

-against-

CARL A. VERGARI, District
Attorney of Westchester County,

Defendant.

-----x

Judge Ward

75 CIV 3558

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BURTON S. COOPER, being duly sworn, deposes and says:

1. I am a member of the firm of SHATZKIN, COOPER, LABATON, RUDOFF & BANDLER, attorneys for the plaintiff in this action. I submit this affidavit in support of plaintiff's motion for an order pursuant to Rule 65 of the Federal Rules of Civil Practice, preliminarily enjoining the defendant from prosecuting the plaintiff pursuant to Westchester County Indictment No. 74-00652.

Nature of the Action

2. The action herein arises out of a prosecution in

AFFIDAVIT OF BURTON S. COOPER IN SUPPORT OF PLAINTIFF'S MOTION Westchester County, commenced by the defendant against the plaintiff, pursuant to Indictment No. 74-00652, which was returned by a Westchester County grand jury on August 15, 1974. Thereafter, on January 21, 1975, the United States Supreme Court, in Taylor v. Louisiana,¹ rendered a decision declaring unconstitutional a grand jury impanelling which excluded or provided for exemption of women, and one week later, on January 27, 1975, in Daniel v. Louisiana,² the Court ruled that Taylor would not have retroactive application in cases where a conviction had been secured by a jury impanelled prior to the date of that decision.

3. On April 9, 1975, plaintiff moved for an order dismissing the indictment on the grounds that the grand jury in this case was likewise unconstitutionally impanelled and that the state statute, §665(7) of the Judiciary Law, which provided for such impanelling, was invalid as applied by reason of its repugnancy to both the Sixth and Fourteenth Amendments to the United States Constitution and cases decided thereunder. By order dated May 20, 1975, plaintiff's motion was denied by Westchester County Court Judge Lawrence N. Martin, Jr. A copy of the decision is annexed

¹ ___U.S.___, 42 L Ed 2d 690, 95 S. Ct. ___, dec. January 21, 1975.

² ___U.S.___, 42 L Ed 2d 790, 95 S. Ct. ___, dec. January 27, 1975.

AFFIDAVIT OF BURTON S. COOPER IN SUPPORT OF PLAINTIFF'S MOTION to the complaint. Thereafter, he directed that the case be marked ready for trial.

4. No challenge is being made here to either of the statutes which plaintiff is accused of having violated.

5. The facts, based upon which this application is made, are set forth in the complaint. Briefly outlined, they are:

(a) When plaintiff was indicted in August of 1974, there were two Westchester County grand juries designated "A" and "B". Lorraine Berman was indicted by Grand Jury "A", on which there were no women. There was one woman on Grand Jury "B".³ At the time of plaintiff's indictment, §665(7) of the New York Judiciary Law allowed women the right to automatically exempt themselves from service on a petit jury, and by virtue of §684 of the Judiciary Law, such exemption also applied to service on a grand jury. During the years prior to Taylor, thousands of New York women claimed the now declared impermissible exemption provided in §665(7) of the Judiciary Law. Taylor held that

...it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex

³ See affirmation of Douglas A. Cooper, Exhibit "A" to the complaint.

AFFIDAVIT OF BURTON S. COOPER IN SUPPORT OF PLAINTIFF'S MOTION

if the consequence is that criminal jury venires are almost entirely male.

[Emphasis added.] 42 L Ed 2d at 702. Daniel held that

Taylor is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empanelled prior to the date of that decision.

[Emphasis added.] 42 L Ed 2d at 792.

(b) The plaintiff herein has not been convicted of any crime. In fact, her trial has not yet begun.

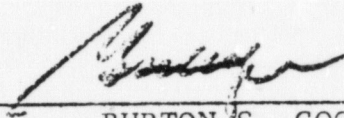
(c) Pursuant to §450.10 of the New York Criminal Procedure Law, plaintiff cannot appeal Judge Martin's denial of her motion to dismiss the indictment. The issue may be again raised only after conviction, at which time Daniel will bar relief.

6. At this time, plaintiff has no way of ascertaining when her case in Westchester will reach the Ready Day Calendar, and no way of determining how soon she will be required to stand trial. Consequently, pending the hearing and determination of this action for a permanent injunction, it is essential that the state court prosecution be preliminarily enjoined.

7. No prior application has been made for the relief sought herein.

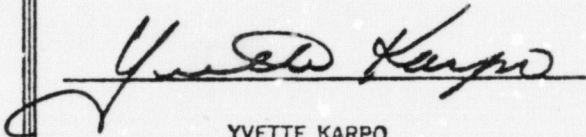
AFFIDAVIT OF BURTON S. COOPER IN SUPPORT OF PLAINTIFF'S MOTION

WHEREFORE, the motion for a preliminary injunction in an action for a permanent injunction and declaratory relief should be granted.



BURTON S. COOPER

Sworn to before me this 16th
day of July, 1975.



YVETTE KARPO

NOTARY PUBLIC, State of New York

No. 31-2038635

Qualified in New York County

Commission Expires March 30, 1977

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LORRAINE BERMAN,

Plaintiff

- against -

Judge Ward

CARL A. VERGARI, District Attorney
of Westchester County,

75 Civ 3558 RJW

NOTICE OF MOTION

Defendant

-----X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Jonathan Z. Friedman, duly sworn to the 6th day of August 1975, the memorandum of law and the pleadings and proceedings heretofore had herein the undersigned will move this Court at a Part thereof to be held in room 505 of the United States Courthouse, Foley Square, New York, New York on the 12th day of August 1975 at 2:15 p.m. in the afternoon of that day or as soon thereafter as counsel may be heard for an order dismissing the above captioned complaint upon the ground that a Federal Court will not under ordinary circumstances enjoin a pending State criminal prosecution where defense of the prosecution in the New York State Court affords an adequate remedy at law for the vindication of the Federal right at issue and for such other and further relief as to this Court seems just and proper.

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

Dated: WHITE PLAINS, N.Y.
August 6, 1975.

Yours, etc.

51
CARL A. VERGARI
District Attorney of Westchester County
Courthouse
111 Grove Street
White Plains, New York 10601

To: Shatzkin, Cooper, Labaton, Rudoff & Bandler, Esqs.
Attorneys for Plaintiff
235 East 42nd Street
New York, New York 10017

AFFIDAVIT OF JONATHAN Z. FRIEDMAN IN SUPPORT OF DEFENDANT'S ~~MOTION~~.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LORRAINE BERMAN,

Plaintiff

- inst -

Judge Ward

CARL A. VERGARI, District Attorney
of Westchester County,

75 Civ 3558 RJW

AFFIDAVIT

Defendant

-----X

STATE OF NEW YORK)
 : ss:
COUNTY OF WESTCHESTER)

JONATHAN Z. FRIEDMAN, being duly sworn, deposes and says that he is an Assistant District Attorney of Westchester County and makes this affidavit in support of the motion by the defendant, Carl A. Vergari, District Attorney of Westchester County, to dismiss the above captioned complaint.

By Indictment No. 74-00652, the plaintiff was charged with the crimes of Grand Larceny in the Second Degree and a Violation of Section 366-b of the Social Services Law of the State of New York. The essence of the charges is that the plaintiff wrongfully obtained money of the value of over \$1,500.00 from the Department of Social Services in behalf of her mother, Edith M. Levy, by means of making false statements and representations and by concealing material facts concerning the existence of property and resources of Edith M. Levy.

AFFIDAVIT OF JONATHAN Z. FRIEDMAN IN SUPPORT OF DEFENDANT'S MOTION

Indictment No. 74-00652 was returned by a Grand Jury impaneled by the County Court of Westchester County and the indictment was duly filed with that Court on August 15, 1974. On the same day, the defendant was arraigned, entered a plea of not guilty and requested, and was given by the Court, some thirty days for motions. Subsequent thereto, a pretrial motion was submitted on behalf of the plaintiff which motion sought various relief. Although the motion sought dismissal of the indictment, it was not grounded on the rationale later to be announced in Taylor v. Louisiana, ___ U.S. ___ 9th sct ___, 42 L. Ed 2d 690. The motion was subsequently denied in a decision and order dated February 13, 1975 (People v. Berman, Westchester County Court, Ind. No. 74-00652, Couzens, J.).

Thereafter, and on April 9, 1975, the plaintiff moved again to dismiss the indictment; this time, the motion was grounded on the assertion that the "...grand jury which handed up the indictment was unconstitutionally impaneled, and on the grounds that the State statute providing for such impaneling was invalid as applied by reason of its repugnancy to both the Sixth and Fourteenth Amendments to the United States Constitution and cases decided thereunder...". In a decision and order dated May 20, 1975, the County Court denied the motion (People v. Berman, Westchester County Court, Ind. No. 74-00652, Martin, J.; a copy of the decision is attached to the plaintiff's complaint as Exhibit "B"). On May 27, 1975, this matter was marked "Ready" for trial by both sides; on the following day by order of Hon. Joseph F. Gagliardi,

AFFIDAVIT OF JONATHAN Z. FRIEDMAN IN SUPPORT OF DEFENDANT'S MOTION
Administrative Judge of the Ninth Judicial District, indictment 74-00652 was transferred to the Criminal Term of the Supreme Court of the State of New York for the County of Westchester where it remains pending. It is not expected that indictment 74-00652 will be reached for trial until at least 12 months have passed.

The plaintiff now seeks to preliminarily enjoin the defendant from prosecuting her under indictment 74-00652; she further seeks a judgment declaring that §665 (7) of the New York Judiciary Law, as it stood at the time she was indicted, was contrary to the Sixth and Fourteenth Amendments to the United States Constitution; finally she seeks a permanent injunction pursuant to 42 U.S.C. §1983 enjoining the defendant from prosecuting her under indictment no. 74-00652.

The plaintiff makes no meaningful factual allegations that the State prosecution was undertaken in bad faith or that any efforts have been made on behalf of the State to harass or intimidate her in the exercise of her constitutional rights. Further, while there is a claim that the State Courts would fail to provide an adequate forum for the resolution of the constitutional issues raised, the facts of this matter and the holdings of Taylor v. Louisiana, supra and Daniel v. Louisiana, ___ U.S. ___ 955 ct ___, 42 L. Ed 2d 790, reveal that the State Courts provide the only possible forum for the resolution of the issues raised by plaintiff. Accordingly, and for the reasons more fully stated in the accompanying memorandum of law, the captioned complaint should be dismissed.

28a

AFFIDAVIT OF JONATHAN Z. FRIEDMAN IN SUPPORT OF DEFENDANT'S MOTION

WHEREFORE, your deponent prays that the instant motion be in all respects granted.

Sl
JONATHAN Z. FRIEDMAN
Assistant District Attorney

Sworn to before me this 6th

day of August 1975

Sl

CARL E. DEYER
Notary Public, State of New York
No. 4602707
Qualified in Westchester County
Term Expires March 30, 1976

MEMORANDUM DECISION BY WARD, D. J., AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS.

August 18, 1975

Defendant moves to dismiss this action in which plaintiff seeks to enjoin her prosecution under an indictment handed down by a grand jury selected in a manner which systematically exempted women from service.

As the Supreme Court has stated: "In *Taylor v. Louisiana*, U. S. (1975), we held that the Sixth and Fourteenth Amendment command that petit juries must be selected from a source fairly representative of the community." *Daniel v. Louisiana*, 43 U.S.L.W. 3415 (January 27, 1975). Since *Daniel* held *Taylor* not retroactive to convictions by juries empanelled prior to the date of that decision and since the grand jury which indicted her was empanelled prior to the Court's decision in *Taylor*, plaintiff argues that she may only attack this indictment prior to any conviction.

Plaintiff's proper course, however, is by way of appeal from any judgment of conviction, first to the state courts, and if necessary, to the Supreme Court of the United States. She has failed to establish the irreparable injury or bad faith which alone would justify enjoining a state criminal proceeding. *Younger v. Harris*,

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MEMORANDUM DECISION BY WARD, D. J., AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS

401 U.S. 37 (1971); *Mitchum v. Foster*, 407 U.S. 225

(1972). Accordingly, defendant's motion is granted and
the complaint dismissed.

It is so ordered.

ROBERT J. WARD
U.S.D.J.

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ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

August 18, 1975

Motion denied in accordance with memorandum endorsed
on defendant's motion to dismiss.

It is so ordered.

ROBERT J. WARD
U.S.D.J.

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
LORRAINE BERMAN,

Plaintiff,

-against-

NOTICE OF APPEAL

CARL A. VERGARI, District
Attorney of Westchester County,

75 CIV 3558 R J W

Defendant.
-----X

Notice is hereby given that plaintiff, LORRAINE BERMAN, hereby appeals to the United States Court of Appeals for the Second Circuit from two orders entered in this action on August 18, 1975, dismissing the complaint and denying plaintiff's motion for a preliminary injunction.

DATED: New York, New York
September 3, 1975.

SHATZKIN, COOPER, LABATON, RUDOFF
& BANDLER

EDWARD LABATON

BY:

A Member of the Firm
Attorneys for Plaintiff
235 East 42nd Street
New York, New York 10017
(212) 687-8800

TO: Clerk
United States District Court
Southern District of New York

NOTICE OF APPEAL

CARL A. VERGARI, District
Attorney of Westchester County
Courthouse
111 Grove Street
White Plains, New York 10601

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William Finch

Sworn to before me
this 31st day of October, 1975.

C. Jane Hoffman
Notary Public

C. JANE HOFFMAN
NOTARY PUBLIC

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COMMISSION EXPIRES MAR. 30, 1977



